



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 789/2016*, **

<i>Communication submitted by:</i>	X (represented by counsel, John Sweeney and Daniel Taylor)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Australia
<i>Date of complaint:</i>	21 October 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 6 December 2016 (not issued in document form)
<i>Date of adoption of decision:</i>	27 July 2021
<i>Subject matter:</i>	Deportation to Sri Lanka
<i>Procedural issues:</i>	Admissibility – <i>ratione materiae</i> ; admissibility – manifestly ill-founded
<i>Substantive issue:</i>	Risk of torture or other cruel, inhuman or degrading treatment or punishment, if deported to country of origin (non-refoulement)
<i>Article of the Convention:</i>	Article 3

1.1 The complainant is X, a national of Sri Lanka born in 1989. His application for asylum has been rejected and he risks deportation. He claims that his removal to Sri Lanka would constitute a violation by the State party of his rights under article 3 of the Convention. The State party has made the declaration under article 22 (1) of the Convention, effective from 28 January 1993. The complainant is represented by counsel.

1.2 On 28 October 2016, the Committee, acting through its Rapporteur on new complaints and interim measures, informed the complainant that it had denied his request for the provision of interim measures consisting of the issuance of a request to the State party to refrain from removing him to Sri Lanka pending the examination of his complaint.

1.3 On 26 April 2017, pursuant to rule 115 (3) of its rules of procedure, the Committee, again acting through its Special Rapporteur on new complaints and interim measures, denied the State party's request for the admissibility of the communication to be examined separately from the merits.

* Adopted by the Committee at its seventy-first session (12–30 July 2021).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Claude Heller, Erdoğan İscan, Liu Huawen, Ilvija Pūce, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Peter Vedel Kessing.



Facts as submitted by the complainant

2.1 The complainant is of Tamil ethnicity. After the complainant's father died in 2004, the complainant's uncle began to care for the complainant's family. The family were fisherfolk and travelled regularly from Uddapu to Mullaitivu on the eastern coast of Sri Lanka to fish. Uddapu was under the control of the Sri Lanka Army while Mullaitivu was under the control of the Liberation Tigers of Tamil Eelam (LTTE). The fact that family members regularly crossed into an LTTE-controlled area brought them under suspicion of the Sri Lanka Army.

2.2 In 2007, members of the Criminal Investigations Department of the police force of Sri Lanka came to the complainant's uncle's house and took the complainant's uncle away. They said that they were taking him to a police station but, when the family inquired about his whereabouts, they were initially told he was not at the station. When the family was eventually allowed to see him, they found him injured and bleeding. The following week, members of the Criminal Investigations Department interviewed all the members of the family. They accused them of hiding weapons and of helping LTTE. The complainant's uncle was released in March 2008.

2.3 The family continued to be harassed by the authorities and the complainant feared for his safety. In July 2011, he left for Dubai, United Arab Emirates, by paying bribes to immigration officials through an agent. He stayed in Dubai for about nine months but returned to Sri Lanka when his uncle fell ill.

2.4 About two months after the complainant's return, in May 2012, he and his brother went to attend festivities with friends. While they were at a bus stop, they were detained before being taken to Colombo, where they were kept in incommunicado detention for three days. A large number of other people were also arrested at the same time in different locations. The complainant was accused of having links with LTTE and of attempting to leave the country illegally. The interrogators beat him and even squeezed his testicles. The complainant did not disclose this to the State party authorities during his initial application for asylum because he was ashamed.

2.5 The complainant and his brother, together with most of the other people detained on the same occasion, were charged with having attempted to leave the country illegally and were released on bail. They were photographed by the press and a number of articles were published. In total, 119 people were arrested on that occasion, 113 of whom were later charged – seven with having organized for migrants to be taken from Sri Lanka by boat and the rest, including the complainant, with having attempted to illegally depart from Sri Lanka. The complainant left Sri Lanka before the start of the trial and arrived in Australia in July 2012.

2.6 The complainant's application for a protection visa was rejected by the Department for Immigration and Border Protection on 17 October 2013. The Department noted that, at the time the complainant travelled to Dubai, it had been three years since his uncle had been released from prison and that, during that period, neither the complainant nor any other member of his family appeared to have had any particular problems with the local authorities. The Department concluded that the complainant had travelled to Dubai for employment opportunities and not for fear of harm. It further found, based on court transcripts, that the complainant had not been arrested in 2012 in a random act but while he was preparing to depart from Sri Lanka illegally. Regarding the complainant's claim that he had been ill-treated while in custody, the Department found, given the large number of persons arrested, the routine nature of his case and the complainant's vagueness in his description of what exactly had happened, that he had not been subjected to ill-treatment. Moreover, the Department noted that, although the complainant's brother too had been arrested, the brother had stayed in Sri Lanka without incurring harm. The Department concluded that there was no evidence to indicate that the Sri Lankan authorities had ever considered the complainant to have had any involvement with LTTE and that he would therefore not be at risk of ill-treatment in Sri Lanka.

2.7 The complainant appealed the decision of the Department for Immigration and Border Protection to the Refugee Review Tribunal. During the interview held in the context of that appeal, the complainant stated that he had been penetrated and beaten with a stick while

detained by the police. He also submitted a medical note from a medical practitioner in Sri Lanka in which it was stated that the complainant had multiple contusions on his whole body following an assault on 3 June 2012. The Tribunal found that the complainant's account was not entirely credible, as he had not grown up in an LTTE-controlled area as he had initially claimed. The Tribunal also found that the complainant had been arrested when he had attempted to leave Sri Lanka. Regarding the letter from the medical doctor, the Tribunal noted that it had been submitted to the Tribunal after a question regarding medical documentation had been raised by the Tribunal.

2.8 The Tribunal noted that, while the complainant had been detained in May 2012, the letter from the medical doctor was dated 23 January 2015. Moreover, the Tribunal noted that the letter did not support the complainant's allegation that the ill-treatment to which he had been subjected included penetration with a stick. Given its concern about the overall credibility of the complainant's account, the Tribunal was not satisfied that the complainant had been ill-treated while detained. The Tribunal found that, if the complainant were to be detained upon return to Sri Lanka due to the outstanding charge against him, his profile did not indicate that he would be singled out for ill-treatment by the authorities. Based on information available on the situation in the country, the most likely penalty for leaving Sri Lanka illegally would be a fine, unless the person was suspected of facilitating or organizing the smuggling of persons. The complainant's application for judicial review of the decision was rejected by the Federal Circuit Court on 14 August 2015. That decision was upheld by the Federal Court on 2 September 2015.

Complaint

3. The complainant claims that, if deported to Sri Lanka, he will be arrested for his illegal departure and, once the earlier charges against him are discovered, he will be kept in detention for an extended period of time. He claims that he risks being subjected to torture and ill-treatment during his detention, as this is usual practice in Sri Lanka.

State party's observations on admissibility and the merits

4.1 The State party submitted its observations on the admissibility of the communication by a note verbale dated 6 February 2016. It submits that the communication is inadmissible *ratione materiae* and because it is manifestly unfounded.

4.2 The State party submits that the complainant has made a number of claims that are inadmissible *ratione materiae*. In particular, the State party refers to the complainant's claims that he was subjected to cruel, inhuman or degrading treatment or punishment by the Criminal Investigations Department. The State party argues that article 3 of the Convention does not apply to these claims because they do not involve allegations that the complainant has been subjected to harm of such a degree as to fall within the definition of torture under article 1 of the Convention and that the complainant cannot therefore claim that he is the victim of a violation by the State party of the Convention.

4.3 If the Committee does not accept that the complainant's claims are inadmissible *ratione materiae*, the State party also submits that the claims are manifestly unfounded. The State party notes that the complainant claims that he would risk detention and torture in Sri Lanka. The State party argues that the complainant does not offer any specific evidence in support of his claims and submits that they are therefore inadmissible because they are manifestly unfounded.

4.4 The State party further submits that the complainant's claims have been thoroughly considered by several decision makers at the domestic level and have been found not to engage the State party's non-refoulement obligations under the Convention. The complainant has not submitted any new claims or evidence in his submission to the Committee that have not already been considered by the domestic authorities. It further notes that the domestic authorities have found a number of the complainant's claims to be not credible.

4.5 On 28 August 2017, the State party submitted its observations on the merits. It reiterates that the communication should be found inadmissible. Should the Committee consider the communication to be admissible, then the complainant's claims are without merit.

4.6 The State party argues that its authorities have considered the complainant's claims in detail and determined that his claims for protection were not substantiated and that some of the claims were exaggerated. It notes that the complainant's claims have been assessed against the State party's non-refoulement obligations and they have been found not to engage those obligations. It notes that the complainant's application for a protection visa was rejected on 17 October 2013. In considering the complainant's application, the authorities had before them the transcript of a protection visa interview conducted by an officer of the Department for Immigration and Border Protection with the complainant in the presence of a Tamil interpreter, relevant material (such as the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka*) and country information, including from the Department of Foreign Affairs and Trade of Australia, the Department of State of the United States of America and the Home Office of the United Kingdom of Great Britain and Northern Ireland. Based on that information, the authorities concluded that the complainant had never been of interest to the Sri Lankan authorities, despite his arrest in 2012, and that there was no real chance that he would be subjected to serious or significant harm when arriving at Colombo airport, while on remand at Negombo prison or afterwards.

4.7 Following the complainant's appeal of the decision, a hearing was held on 15 January 2015 before the Refugee Review Tribunal. The complainant was able to make oral and written submissions with the assistance of a Tamil interpreter. He was represented at the hearing by his registered migration agent. The Tribunal considered all the claims made by the complainant in his submissions to the Committee. The Tribunal expressed concerns about the credibility of the complainant's claims. In particular, it noted significant inconsistencies between his written submissions and his statutory declaration and it found that some of his claims were exaggerated or vague. The Tribunal was not satisfied that the complainant had a well-founded fear of persecution as a young Tamil male with a perceived pro-LTTE stance, nor on the basis that he grew up in an LTTE-controlled area or that he lived in such an area after the end of the war.

Complainant's comments on the State party's observations on admissibility and the merits

5.1 On 3 September 2018, the complainant submitted his comments on the State party's observations. He maintained that the communication was admissible. He notes that his account of events was found to be not credible owing to discrepancies in his statements but argues that his ability to recall certain specific details, such as dates and the length of periods of time, was affected by his history of torture and trauma. He argues that these inconsistencies have been afforded disproportionate weight in the assessment of credibility.

5.2 The complainant reiterates his claims that, if returned to Sri Lanka, he would be at risk of spending an extended period of time in pretrial detention for having attempted to leave the country illegally. He claims that, as a person who has previously been subjected to torture and who is imputed to be an LTTE supporter, he would risk being subjected to a real risk of torture and ill-treatment upon return. He claims that he was not given culturally appropriate means by which to raise his claims of torture. He did not know that, as a victim of sexual violence, it was within his rights to request a male lawyer and male interpreter, which would have made it easier for him to disclose the sexual violence to which he had been subjected. He should have been asked at the very start of the process, including in the assignment of government-appointed lawyers and interpreters, if he had claims that required staff or officers of a specific gender to fulfil those roles. The complainant claims that he was not given a fair opportunity to present evidence proving that he had been subjected to torture and claims that the evidence that he was able to produce was not fairly assessed but, rather, that it was dismissed on the basis of inconsistencies and errors in other parts of his account of the events.

5.3 On 11 September 2019, the complainant submitted additional information arguing that the publication of the decision of the Federal Circuit Court on his application for judicial review could expose him and lead the Sri Lankan authorities to identify him, as the decision contained the dates during which he had been held in detention in Sri Lanka. He claims that those elements would allow the Sri Lankan authorities to match the published data with their own information and thereby identify him and his claims.

Additional submissions by the State party

6.1 On 5 December 2019, the State party submitted additional observations. It reiterates its inadmissibility arguments and notes the complainant's claim that he was not given a fair opportunity to present his evidence concerning his claims of torture. It argues that the assessment of the Refugee Review Tribunal was based on a robust and thorough consideration of the credibility of the complainant's claims. The Tribunal's findings regarding the credibility of the claims was based on multiple factors, including the complainant's lack of explanation or inability to explain claims asserted, a finding that his statutory declaration was misleading, that he had a tendency to exaggerate aspects of his claims, and that a number of the claims made in written submissions were not made before the Tribunal. The complainant was provided ample opportunity to provide evidence during the Tribunal hearing and all the complainant's claims, including that of having been subjected to sexual assault, were duly considered. It notes that the complainant was represented at the protection visa interview stage and that any concerns regarding his capacity to engage in the process, or any special consideration that ought to have been afforded, could have been raised at that time.

6.2 The State party notes the complainant's claim that he could be identified through the decision of the Federal Circuit Court. It submits that it is implausible that Sri Lankan authorities would be able to identify the complainant based only on the dates of his departure and detention. It argues that the State party's authorities have consistently found no evidence to suggest that the complainant would be of ongoing interest to the authorities if returned to Sri Lanka.

Additional submissions by the complainant

7. On 1 March 2020, the complainant submitted additional comments on the State party's observations. He reiterates his claims that he would be at risk of being identified on the basis of the published Federal Circuit Court decision. He reiterates his claims that he was subjected to torture and ill-treatment while detained in 2012 and his claims that the Refugee Review Tribunal failed to properly take those facts into account in its decision.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.2 In accordance with article 22 (5) (b) of the Convention, the Committee shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party has not contested that the complainant has exhausted all available domestic remedies. The Committee therefore finds that it is not precluded from considering the communication under article 22 (5) (b) of the Convention.

8.3 The Committee notes the State party's argument that the communication is inadmissible *ratione materiae* and because it is manifestly unfounded, as the complainant has not substantiated the existence of substantial grounds for believing that he would face a foreseeable, present, personal and real risk of torture if he were returned to Sri Lanka. With regard to competence *ratione materiae*, the Committee notes the complainant's argument that, if returned to Sri Lanka, he would risk being detained and subjected to torture. The Committee considers that these claims may raise issues under article 3 of the Convention. Accordingly, the Committee finds the complainant's allegations under article 3 admissible *ratione materiae*. The Committee also considers that the complainant has sufficiently substantiated, for the purposes of admissibility, his claims based on article 3 of the Convention regarding his risk of being subjected to torture and ill-treatment if returned to Sri Lanka.

8.4 As the Committee finds no further obstacles to admissibility, it declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22 (4) of the Convention.

9.2 In the present case, the issue before the Committee is whether the forcible removal of the complainant to Sri Lanka would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or return ("refouler") a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would personally be in danger of being subjected to torture upon return to Sri Lanka. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. As regards the case at hand, the Committee refers to its concluding observations on the fifth periodic report of Sri Lanka, in which it voiced serious concerns about reports suggesting that abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including by the police, had continued in many parts of the country after the conflict with LTTE had ended in May 2009.¹ It also refers to credible reports by non-governmental organizations concerning the ill-treatment by the authorities of Sri Lanka of individuals who have been returned to the country.² However, the Committee recalls that the aim of the evaluation to be undertaken in the context of individual complaints is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.³ Moreover, although past events may be of relevance, the principal question before the Committee is whether the complainant currently runs a risk of torture if returned to Sri Lanka.

9.4 The Committee recalls its general comment No. 4 (2017), according to which the Committee will assess "substantial grounds" and consider the risk of torture as foreseeable, personal, present and real when the existence of credible facts relating to the risk by itself, at the time of its decision, would affect the rights of the complainant under the Convention in case of his or her deportation. Indications of personal risk may include, but are not limited to: (a) the complainant's ethnic background; (b) political affiliation or political activities of the complainant or his or her family members; (c) arrest or detention without guarantee of a fair treatment and trial; and (d) sentence in absentia (para. 45). With respect to the merits of a communication submitted under article 22 of the Convention, the burden of proof is upon the author of the communication, who must present an arguable case, that is, submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real (para. 38).⁴ The Committee also recalls that it gives considerable weight to findings of fact made by organs of the State party concerned, however, it is not bound by such findings, as it can make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case (para. 50).

9.5 The Committee notes the complainant's claims that he would be at risk of treatment contrary to article 3 of the Convention if returned to Sri Lanka as he would be arrested for

¹ CAT/C/LKA/CO/5, paras. 9–12. See also CAT/C/LKA/CO/3-4, para. 6.

² Freedom from Torture, *Tainted Peace: Torture in Sri Lanka since May 2009* (London, 2015); and Human Rights Watch, *World Report 2019* (New York, 2019).

³ See, e.g., *S.P.A. v. Canada* (CAT/C/37/D/282/2005), para. 7.1; *T.I. v. Canada* (CAT/C/45/D/333/2007), para. 7.3; and *A.M.A. v. Switzerland* (CAT/C/45/D/344/2008), para. 7.2.

⁴ *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.4.

his illegal departure from Sri Lanka and that he would be at risk of being subjected to torture and ill-treatment during his detention owing to his imputed support of LTTE.

9.6 The Committee also notes the State party's submission that the claims presented by the complainant have been thoroughly considered by the State party's authorities, which found that he would not be at risk of treatment contrary to article 3 of the Convention if returned to Sri Lanka. It further notes the findings of the Department of Immigration and Border Protection that the complainant travelled to Dubai in 2011 for employment opportunities and not for fear of harm, as well as the finding, based on court transcripts, that the complainant had not been arrested in 2012 in a random act but rather in the context of his attempted illegal departure from the country. The Committee notes that the complainant's claims of having been subjected to torture and ill-treatment while detained in 2012 were found to be not credible by the Refugee Review Tribunal owing to discrepancies in his account of the events and because the medical note he presented was dated three years after the alleged incident had occurred and did not support the complainant's allegation of having been subjected to sexual violence. The Committee also notes that the State party's authorities found that the complainant's claim that he had not grown up in an LTTE-controlled area, as he had initially stated in his application for asylum, was not credible, as were other elements of his account.

9.7 The Committee notes the complainant's claims that he was not given a fair opportunity to present evidence to prove that he had been subjected to torture, that the evidence that he was able to present was not fairly assessed and that he was not given culturally appropriate means by which to raise his claims of torture. It also notes the State party's arguments that the complainant's claims were thoroughly assessed by the State party's authorities and that the complainant was represented at the protection visa interview stage and during the hearing before the Refugee Review Tribunal and that any concerns regarding his capacity to engage in the process, or any special consideration that ought to have been afforded, could have been raised on those occasions. The Committee therefore finds that the complainant has not shown how the authorities' assessment of his application for asylum was affected by a lack of independence or impartiality, or that the authorities of the State party, which considered the case, failed to conduct a proper investigation into his allegations.

10. In the light of the above considerations, and on the basis of all the information submitted to it by the parties, the Committee considers that, in the present case, the complainant has failed to adduce sufficient evidence and to adequately substantiate his contention that the alleged past events would attract the real interest of the authorities of Sri Lanka. Having also considered the general situation of human rights in Sri Lanka, the Committee is of the view that the complainant has failed to substantiate his claims that his removal to Sri Lanka would amount to a real, foreseeable, personal and present risk of being subjected to treatment contrary to article 3 of the Convention.⁵

11. The Committee, acting under article 22 (7) of the Convention, concludes that the complainant's removal to Sri Lanka by the State party would not constitute a breach of article 3 of the Convention.

⁵ General comment No. 4 (2017), para. 38.